IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-844

Supreme Court, U. S.
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KENNETH A. PLANTE, DEMPSEY J. BARRON, PHILIP D. LEWIS, JACK D. GORDON and JON C. THOMAS,

Petitioners,

vs.

LARRY GONZALEZ, as Executive Director of the Florida Commission on Ethics; BRUCE SMATHERS, as Secretary of State of Florida; THE FLORIDA COMMISSION ON ETHICS; and REUBIN O'D. ASKEW, as Governor of the State of Florida,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The question presented by Petitioner assumes the existence of that which is in issue. Respondent would restate the questions presented as follows:

1. Whether any fundamental right of privacy under the Fourteenth Amendment exists in favor of elected state Senators against public disclosure of commercial, financial matters, especially where such

elected state officers concede that no such right of privacy exists to preclude the initial collection of such information.

2. If the answer to question one is in the affirmative, whether such public disclosure must be tested by a "balancing" test against conceded "vast concerns" of the state in deterring governmental corruption, or whether a "least restrictive means" test must be applied.

3. If a "least restrictive means" test must be applied, was the Fifth Circuit Court of Appeals correct in its conclusion that public disclosure to the electorate (rather than to a secret commission, hidden from the voters) is the only means to provide this important information to the voting public.

REASONS FOR DENYING THE WRIT

The bases for granting a writ of certiorari pursuant to Rule 19, Supreme Court Rules, are not present in this case. The decision below is not in conflict with a decision of another court of appeals on the same subject matter, nor is it in conflict with decisions of this Court. As will be shown, the decision is in accord with the nearly unanimous line of decisions from ten states and one other federal court of appeals. For these reasons, the issue of federal law in this case is presently being applied correctly and uniformly and does not require further elucidation by the Court. Moreover, to accept Petitioners' invitation to create new federal privacy rights where none now

exist would place the federal judiciary in the untenable position of acting as censor over the daily operation of open meetings laws and public records laws of every state, county, municipality, school board, special taxing district, or other local entity in this country. Such an extension of the right of privacy from the intimacies of marriage and procreation to financial transactions in the marketplace has no basis in the Constitution.

I.

THIS CASE DOES NOT PRESENT A FEDERAL QUESTION OF GREAT SIGNIFICANCE.

The questions presented herein were correctly decided by the Courts below in lengthy, thoughtful opinions, the decisions of most states are uniformly in accord, there is no "growing conflict" among state decisions, the prior decisions of this Court have obviously provided clear guidance on the issue, and a decision on the issues herein will not settle the question in the 40 other states which have uniquely varied disclosure laws. For these reasons, this case does not present a federal question of great significance.

Petitioners would have the Court believe that fifteen (the total is actually fourteen[1]) state courts have ruled upon state financial disclosure laws,

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[1]The total actually is fourteen states. The Alabama case cited by Petitioners, Comer v. City of Mobile, 337 So.2d 742 (1976) did not address disclosure issues.

and that five have refused to sustain such laws on grounds relevant to this petition. In fact, ten[2] state courts have addressed and rejected claims of "right of privacy" based upon the federal constitution. Of the five other cases cited by Petitioners as having "refused to sustain their particular state's disclosure laws," only two did so on federal privacy grounds, and these decisions are premised upon extremely flimsy analysis of the issue.

The first of the two decisions, City of Carmel-by-the-Sea v. Young, 466 P.2d 225 (Calif. 1970) was the nation's first case on this subject, cites no case from this Court for its ultimate conclusion that a federal right of privacy exists in financial matters, and was subsequently severely undermined by County of Nevada v. MacMillen, 522 P.2d 1345 (Calif. 1974), and Hays v. Wood, 78 Cal. Supp.3d 352, 144 Cal.

[2]Eight such states are collected in footnote 24, Petitioners' Brief. To these must be added: Florida: Goldtrap v. Askew, 334 So.2d 20 (1976). Wisconsin In re Kading, 70 Wis.2d 508, 235 N.W.2d 409 (1975). To California must also be added the very important case of County of Nevada v. MacMillen, 522 P.2d 1345 (1974). Moreover, several of the decisions collected in footnote 24 of Petitioners' Brief have subsequently been affirmed per curiam by the highest courts of New Jersey and New York: New Jersey: Lehrhaupt v. Flynn, 383 A.2d 428 (1978); Kenny v. Byrne, 383 A.2d 428 (1978). New York: Hunter v. City of New York, 44 N.Y.2d 708, 405 N.Y. S.2d 455 (1978).

Rptr. 456 (1978). City of Carmel has clearly been laid to rest in California. The only other decision arguably based upon a purported federal right of privacy in financial matters is Labor's Educ. and Pol. Club v. Danforth, 561 S.W.2d 339 (Mo. 1978), which is even more remarkable for its failure to cite any federal cases on the subject (561 S.W.2d at 349-50), and concerned only candidate financial disclosure.[3]

The other three cases cited by Petitioners as having failed to sustain disclosure laws did so upon grounds wholly irrelevant to this petition.[4]

[3]The case should be compared with Chamberlin v. Missouri Elections Commission, 540 S.W.2d 876 (Mo. 1976) where the same Missouri Supreme Court considered the same statutory provision and rejected challenges based upon "overbreadth," equal protection, and the attorney-client privilege.

[4]Alaska: Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469 (Alas. 1977) was decided on state constitutional grounds; the Alaska constitution has an explicit "right of privacy." Moreover, the case ruled only upon disclosure of contraceptive, venereal disease, and psychiatric patients of a physician. The claim of privacy was more that of the patient than the physician. Moreover, unlike Florida's $1000 threshold, the income threshold was a mere $100. The court indicated that if such patients are excluded, other patients' names may be compulsorily disclosed. Michigan: Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich.

In sum, fifteen judicial decisions in ten states have correctly followed the decisions of this Court to reject challenges to their unique financial disclosure laws based upon an asserted federal right of privacy in commercial and financial matters. The two state judicial decisions to the contrary are aberrations, and can hardly be said to conflict with decisions of this Court since neither decision rests its conclusion upon a ruling (dicta or otherwise) from this Court.

On five prior occasions this Court has been presented with similar claims to financial privacy with respect to public disclosure requirements. In three cases, the Court dismissed the appeal for lack of a substantial federal question. Montgomery County v. Walsh, 274 Md. 489, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306 (1976); Fritz v. Gorton, 83 Wash. 275, 517 P.2d 911, appeal dismissed, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974); Stein v. Howlett, 52 Ill.2d 570, 289 N.E.2d 409 (1972), appeal dismissed, 412

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[4]Continued from previous page:

465, 242 N.W.2d 3 (1976) was decided on state grounds, overbreadth and equal protection under the state constitution. Indeed the court ruled that Michigan's financial disclosure did not violate a federal privacy right. 242 N.W.2d at 18-21. Nevada: Dunphy v. Sheehan, 549 P.2d 332 (Nev. 1976) concerned a criminal statute and was decided on vagueness grounds. The case contains no ruling upon the privacy issue. 549 P.2d at 336.

U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973). Certiorari was denied in Illinois State Employees Ass'n. v. Walker, 315 N. E.2d 9 (Ill. 1974), cert. den. sub nom. Troopers Lodge No. 41, Fraternal Order of Police v. Walker, 419 U.S. 1058, 95 S.Ct. 642, 42 L.Ed.2d 656 (1974), and O'Brien v. DiGrazia, 544 F.2d 543, 545-46 (1st Cir. 1976), cert. den. sub nom. O'Brien v. Jordan, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).

Summary dismissals for lack of a substantial federal question at least tell us that the underlying principles of law are settled.

> Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Mandel v. Bradley, 432 U.S. 173, 176, 53 L.Ed.2d 199, 205, 97 S.Ct. 2238 (1977).

This petition does not, therefore, present a federal question of great significance. With virtual unanimity the courts of this nation have understood and correctly applied these settled principles. Petitioners' invitation that a new fundamental federal cause of action respecting commercial matters be shaped from the fuzzy fringes of penumbras, statements in dissenting and concurring opinions, and obiter dicta, should be declined by the Court.

If there were a fundamental right of privacy in non-disclosure of financial matters by elected public officials, the decisions would have been a great deal less uniform in sustaining public disclosure statutes because the disclosure statutes vary so widely from state to state.[5]

Typically disclosure statutes apply only to executive and legislative officials and not to judges due to problems with separation of powers.[6] Thresholds vary, secondary source disclosure rules differ, some require disclosure of interests of family members, some require dollar amounts, while others only values by categories, and the ranges of public officials and employees required to disclose are as diverse as are the 50 states. Each, it must be assumed, is a rational political response to the felt needs of the particular jurisdiction.

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[5]Petitioners concede as much by their citation to the multitude of diverse disclosure procedures in the various states (pp. 24-25, 28-30, Petitioners' Brief) and their statement that "[t]he contextural variations among the statutes and the differing ground for the decisions defy any inventory analysis." (e.s., p. 32, Petitioners' Brief.)

[6]The Florida disclosure statute, §112.3145, Fla. Stat. (1975) was ruled not applicable to the judicial branch due to separation of powers. In re the Florida Bar, 316 So.2d 45 (Fla. 1975). See also generally Dunphy v. Sheehan, 549 P.2d 332, 336 (Nev. 1976); In re Kading, 235 S.W.2d 409, 416 and 419 (Wisc. 1975).

The disclosure requirement in the case at bar applies only to "elected constitutional officers" and was adopted by direct citizen initiative as a constitutional amendment in 1976. The vote in favor was overwhelming.[7]

This deeply-felt, grass roots expression by the people of Florida must be viewed as the unique efforts of the citizens of one state to reshape their social compact with those who are given positions of public trust.[8] The adoption by

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[7]The vote was 1,765,625 to 461,940. By comparison, in the 1978 general election the voters of Florida rejected every revision proposed by the Constitutional Revision Commission.

[8]As the Fifth Circuit pointed out, Florida's political history in recent years has given the citizens of Florida some reason for concern:

> Florida's Controller, Treasurer, and Superintendent of Education were indicted for selling their influence. A legislative committee recommended that one state supreme court justice be impeached for similar activities. A second justice resigned under fire. A third supreme court justice was reprimanded by the state body supervising judicial conduct. N.Y. Times, April 27, 1975, at 35, col. 1. In 1976 U. S. Representative Robert L. F. Sikes was reprimanded by the House of Representatives because as

initiative of the Sunshine Amendment is also consistent with Florida's somewhat unique political belief in the wisdom of government accountability through very broad open meetings[9] and public records[10] laws.

At issue in this case, therefore, is public disclosure of financial matters by five elected members of the Florida legislature. The myth of the "part-time" legislator, who leaves the store or farm for a sixty day stint of volunteer duty in Tallahassee, is as wishful as the federal right of commercial privacy which Petitioners seek herein to have established. The five State Senators include among their alleged part-time ranks the current Sentate President, formerly Chairman of the Senate Appropriations Committee, the former Senate President and Chairman of the Senate Governmental Operations Committee, currently the Chairman of the Senate Rules and Calendar Committee, and the current

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[8]Continued from previous page:

Chairman of the House Appropriations subcommittee on military construction he had helped pass legislation and secured government decisions from which he benefited financially. United States Senator Edward Gurney was acquitted of federal charges stemming from alleged influence peddling. N.Y. Times, July 12, 1974, at 10, col. 1; October 28, 1976, at 19, col. 1. 575 F.2d at 1122 n. 3.

[9]Section 286.011, Fla. Stat. (1977), the Government in the Sunshine Law.

[10]Ch. 119, Fla. Stat. (1977).

or former chairmen of the Senate Committees on Ways and Means, Finance, Taxation and Claims, and Health and Rehabilitative Services. Collectively they exercise an enormous portion of the public trust committed to the legislative branch in Florida, and do so throughout the entire year.

Against the essentially political choice made by the people of Florida (and the diverse legislative choices made by other states) as to what governmentally collected information ought to be made public, this petition invites the Court to create a new fundamental constitutional right of privacy in the marketplace, a right to be fashioned from the shadowy, shifting never-never land of the penumbras asserted to be cast by more explicit provisions in the Bill of Rights. Once such a right is fashioned, Petitioners then ask that it cause a "least restrictive means" test to be applied. In short, Petitioners would have the federal courts become daily censors as to what governmentally acquired data ought to be publically disseminated.

While the Court has not explicitly ruled on the question from this side of the controversy, it has made it clear that the decision not to disseminate governmentally collected information should be left to the political process.[11] In Houchins v. KQED, Inc., _____U.S._____, 57 L.Ed.2d

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[11]The flip side of this lawsuit would be a suit by the press to force public disclosure, had the political choice in Florida been (as Petitioners suggest) to require confidential disclosure to a governmental agency.

553, 98 S.Ct. _____(1978), Mr. Chief Justice Burger wrote:

> There is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient."
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> * * *
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> The First Amendment is "neither a Freedom of Information Act nor an Official Secrets Act." Stewart, Or of the Press, 26 Hast LJ 631, 636 (1975). The guarantee of "freedom of speech" and "of the press" only "establishes the contest [for information] not its resolution . . . . For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American Society." Ibid.

57 L.Ed.2d at 564-65. Mr. Justice Stewart concurred, stating

> [f]orces and factors <u>other than the Constitution</u> must determine what government held data are to be made available to the public. (e.s.)

57 L.Ed.2d at 566, fn.

The case at bar represents a classic example of political choice through citizen initiative. By amendment of their organic law, the people of Florida have chosen that their state government should be more accountable by providing additional information to the voters. Whether to tip the scales back again is not a federal question of great importance, but a political question unique to one state. Mr. Justice Rehnquist made this point in 23 <u>Kan.L.Rev.</u> 1 (1974):

> In concluding this discussion let me observe that I have tried to suggest several shortcomings that appear to me to characterize some of the current discussions about claims to increased privacy. The first shortcoming is at least in part a definitional one - widely divergent claims, which upon analysis have very little in common with one another, are lumped under the umbrella of "privacy." . . . The second shortcoming seems to me to be a failure to recognize the extent to which many claims of privacy, if accepted, would be established <u>at the expense of other competing values</u>, <u>such as the interest in effective law enforcement, the interest in a well informed citizenry</u>, and the interest in efficient expenditure of public funds.
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> * * *
>
> I have, finally, tried to point out why it may be thought preferable

> that those who champion the right Justice Brandeis described as "the right to be let alone" direct their attack to the repeal of existing laws on the books or to opposition to enactment of additional laws. Under this approach the issue may be joined and the conflicts resolved without any unintended sacrifice of other values. (e.s.)

The appropriate balance to be struck between public accountability and the privacy of public officials is essentially a legislative decision:

> The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution . . . . Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority. (e.s.)

Mr. Justice White, dissenting in Moore v. City of East Cleveland, 431 U.S. 494, 543-44, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977).

Expansion of a penumbra right of privacy to the marketplace of financial activity would place the federal judiciary in the role of censor of the daily operation of public records and open meetings laws at every level of government, from Washington, D.C., to the smallest

town hall. The decision whether governmentally acquired information concerning the federal census, taxation, occupational licensing, unemployment compensation, health and safety regulation, zoning, operation of motor vehicles, public housing, parole, arrests, or the like should be disclosed through public records or open meetings is not and ought not be a federal question of great importance.[12]

Respondents therefore would urge the Court to decline Petitioners' invitation and leave intact the well-reasoned opinions of the trial court and court of appeals herein, which are consistent with the nearly unanimous decisions of other jurisdictions that have closely considered the question.

[12]For example, two cases now pending in the Florida Supreme Court assert a right of privacy against the operation of Florida's public records law. One involves whether tenants in public housing are subjected to unconstitutional embarrassment by having tenant records subject to the public records law. Forsberg, et al. v. The Housing Authority of the City of Miami Beach, Case No. 54,623. The second involves the application of the public records law to data collected in an employment search for a new manager of city-owned utility. State ex rel. Schellenberg, et al. v. Byron Harless, Schaffer, Reid and Associates, et al., Case Nos. 54,405 and 54,406.

II.

THE DECISION OF THE COURT OF APPEALS REACHES THE CORRECT RESULT.

A. The Constitution does not provide a right of privacy against public disclosure of financial information with respect to elected state officers.

Petitioners do not contest the "vast concern" of the state to collect financial information from a state legislator. They assert, rather, that once collected the decision whether such information may be made available to the electorate is constrained by a fundamental right of non-disclosure. In this context, the decisions of this Court indicate that such privacy right does not exist.

First, it is clear that publication of financial information does not directly concern or burden certain fundamental familial rights and choices heretofore recognized by the Court as within the "automony" branch of privacy. These matters have been limited by the Court to marriage, procreation, contraception, family relationships and child rearing. Paul v. Davis, 424 U.S. 693, 713, 47 L.Ed.2d 405, 421, 96 S.Ct. 1155 (1976); Paris Adult Theatre v. Slaton, 413 U.S. 49, 65, 37 L.Ed.2d 446, 462, 94 S.Ct. 27 (1973). Financial activity, while at times related to family life, is carried on in the public marketplace, and thus is qualitatively different

from the intimacies of procreation.[13] A line must be drawn somewhere, as the Fifth Circuit pointed out:

> There is no doubt that financial disclosure may affect a family, but the same can be said of any government action.

Plante v. Gonzalez, 575 F.2d 1119, 1131 (5th Cir. 1978). Moreover, in contrast to the "autonomy of choice" cases referenced in Paul v. Davis, financial disclosure does not preclude financial choice:

> Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process. Their effect on financial decisions is more indirect. . . . Our society has long regulated people's finances. Interference with business activity, through licensing, taxing, and direct regulation, is common. All these governmental actions impinge on the ability of the individual to order his financial affairs. They do so directly. The indirect effects caused by financial disclosure pale by comparison. At one time "liberty of contract" was recognized as a major, if not the

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[13] Compare the results in Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971) (marriage) to U.S. v. Kras, 409 U.S. 434, 34 L.Ed.2d 626, 93 S. Ct. 631 (1973) (bankruptcy).

> major, component of the liberty guaranteed by the fourteenth amendment. See, e.g., Allgeyer v. Louisiana, 1897, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832. See generally R. McCloskey, American Conservatism in the Age of Enterprise: 1865, 1910, 72 126 (1951). That is no longer the case. (E.S.)

Plante v. Gonzalez, supra, 575 F.2d at 1130-31.

Lacking a claim to the "autonomy" branch of privacy, Petitioners assert the existence of a fundamental "right to confidentiality" against public disclosure of finances, relying primarily upon Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), Whalen v. Roe, 429 U.S. 589, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977), and Nixon v. Administrator of General Services, 433 U.S. 425, 53 L.Ed.2d 867, 97 S.Ct. 2777 (1977). To support their assertion of the existence of a general right of confidentiality, Petitioners construct an argument from a patchwork of dissents, concurrences, and dicta. The argument does not hang together, however, upon analysis.

Initially, it should be noted that the Court's decisions exhibit a marked reluctance to detect fundamental rights of privacy in the marketplace.[14] In

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[14]Perhaps this is so because of the Court's recognition that the day of judicial supervision of commercial activity in the name of substantive due

California Bankers Assn. v. Shultz, 416 U.S. 21, 39 L.Ed.2d 812, 94 S.Ct. 1494 (1974), the Court reversed a three-judge court ruling in Stark v. Connally, 347 F.Supp. 1242 (N.D. Calif. 1972), which had held that depositors had a Fourth Amendment privacy right in their banking records. The Court concluded that although the bank acted under compulsion of law in maintaining records of the financial transactions of individuals,

> . . . it is equally clear that in doing so it neither searches nor seizes records in which the depositor has a Fourth Amendment right.

416 U.S. at 54, 39 L.Ed.2d at 836. California Bankers Assn. did not involve disclosure of the bulk of these records to the government, however, and stands primarily

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process is over:

> In the area of business regulation "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." Bi-Mettalic Co. v. Colorado, 239 U.S. 441, 445 (1915).

New Motor Vehicle Board of California v. Fox, case nos. 77-837 and 77-849, decided December 5, 1978, 47 U.S. L.W. 4017, 4020.

for the lack of a privacy right in the collection of such records. Subsequently, the Court decided United States v. Miller, 425 U.S. 435, 48 L.Ed.2d 71, 96 S.Ct. 1619 (1976), a case like California Bankers Assn. arising under the Bank Secrecy Act. Miller squarely presented the question whether governmental collection of banking records (by compelling banks to keep records) coupled with compelled disclosure to the government implicated Fourth Amendment privacy rights. The court ruled it did not. 425 U.S. at 443, 48 L.Ed.2d at 79.

Miller pointed out that checks and deposit slips

> . . . are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained . . . contain only information voluntarily conveyed to the banks and exposed to their employee in the ordinary course of business.

425 U.S. at 443, 48 L.Ed.2d at 79.

Disclosure of financial transactions required herein by the Sunshine Amendment concern essentially the same kinds of commercial transactions at stake in Miller. Income is generated and assets acquired by means of transactions in public, outside the home. Like the transactions between bank depositor and commercial bank, such financial transactions typically involve many daily arms-length disclosures through public recording, financing and insurance arrangements, advertising, and the like.

Given the quasi-public nature of financial information, the question is whether the constitution gives to public officials a fundamental right of confidentiality in such information. The starting place for analysis is Paul v. Davis, supra. Paul v. Davis ruled that the publication of information collected by the government, even though defamatory per se under state tort law, does not rise to the level of a constitutional infringement of a "liberty" or "property" interest guaranteed against state deprivation without Fourteenth Amendment due process of law. 424 U.S. at 712, 47 L.Ed.2d at 420. More importantly Paul ruled that publication of such information did not implicate a constitutional right of privacy despite the fact that Plaintiff had alleged (and on a motion to dismiss, such allegations were assumed true) that by branding him as an "active shoplifter," his future employment opportunities would be impaired and he would be inhibited from entering commercial establishments for fear of arrest.

Paul v. Davis is the touchstone for understanding the decisions relied upon by Petitioners. Paul v. Davis informs us that publication of information by the government, even though potentially damaging (or even tortious), does not give rise to a federal claim in the absence of a direct impact upon a legal status or an explicit guarantee found elsewhere in the Constitution.[15] As such, Paul v. Davis

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[15]The "injury plus" rule of Paul v. Davis is analytically similar to the test recently adopted by the Court in Rakas v. Illinois, Case No. 77-5781, decided December 5, 1978, 47 U.S.L.W. 4025, for

is the only decision of this Court concerning publication of government information, in contrast to collection of such information.

Paul v. Davis thus explains the meaning of this Court's reference in Buckley v. Valeo, supra, to Mr. Justice Powell's concurring remarks in California Bankers Assn. (that "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs"). Petitioners rely heavily upon this passage as establishing a general right of confidentiality unconnected with any explicit provision of the Constitution. But as Paul v. Davis would require, the reference in Buckley directly concerns explicitly protected fundamental First Amendment freedoms (so-called privacy of belief and association with respect to political campaigns). Since the public disclosures in the case at bar are not concerned with financial transactions directly supportive of speech and expression, Buckley is of little use to Petitioners.[16]

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[15]Continued from previous page:

determining when Fourth Amendment "privacy" applies to unreasonable governmental intrusions. Rakas provides that an individual's subjective expectation of privacy is not enough without society's recognition that that expectation is reasonable. 47 U.S.L.W. 4032 and 4030 n. 12.

[16]Where such disclosure does violate a right secured by the Constitution, the violated right is not any right of privacy but some other right whose

Similarly, Nixon v. Administrator of General Services, supra, did not create a general right to confidentiality, but rather was concerned with disclosures which impacted fundamental rights that had previously gained explicit recognition. The "privacy" of the communications in Nixon gained protection from the inseparable[17] conjunction of rights secured by separation

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> exercise is deterred or hampered by disclosure . . . . For example, "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976) (per curiam). In these areas, the Constitution secures the right of privacy because the right is "indispensable" to some other constitutional right . . . . This limitation of the constitutional right of privacy is the only way to prevent its invasion from becoming a general constitutional tort.

Crain v. Krehbiel, 443 F.Supp. 202, 209 (N.D. Calif. 1978).

[17]As Mr. Justice Rehnquist noted in dissent, these concepts cannot be compartmentalized. 433 U.S. at 545 n. 1, 53 L.Ed.2d at 954-55, n.1.

of powers, Presidential privilege,[18] and the autonomy branch of privacy, which protects intimate communications in a marriage or family context.

The subject matter in Nixon was speech itself, and speech of the most intimate familial nature.[19] At stake in Nixon were the direct, unedited, and candid voice recordings of ". . . extremely private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his

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[18]See United States v. Nixon, 418 U.S. 683, 708, 41 L.Ed.2d 1039, 1063-64, 94 S.Ct. 3090 (1974).

[19]Mr. Chief Justice Burger noted the distinction here between "private papers" such as a "personal diary or family correspondence" and "commercial matters:"

> The Court's refusal to afford constitutional protection to such commercial matters as bank records, California Bankers Assn. v. Shultz, 416 U.S. 21, 39 L.Ed.2d 812, 94 S Ct. 1494 (1974), or drug prescription records, Whalen v. Roe, 429 U.S. 589, 51 L.Ed.2d 64, 97 S.Ct. 869 (1977) only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.
> 433 U.S. at 529, n. 27, 53 L.Ed. at 944 n. 27.

wife's personal files . . . ." (e.s.) 433 U.S. at 459, 53 L.Ed.2d at 901. Nixon is of no applicability here.[20]

The only other case relied upon by Petitioners for a fundamental right of confidentiality in financial matters is Whalen v. Roe, supra. Whalen makes it very clear, however, that the Court therein was only deciding whether collection of data concerning drug usage was permissible. Whalen concludes with the caveat that the Court was not deciding the existence of a fundamentalgeneral right of confidentiality to preclude public disclosure of data collected by the government. 429 U.S. at 605-06, 51 L.Ed.2d at 77. Compare the separate concurrences of Mr. Justice Stewart with Mr. Justice Brennan.

Had Whalen addressed the issue whether there exists a general right of confidentiality, it is submitted that the Court would have concluded that no provision of the Constitution protects such asserted privacy. First, the authority for the so-called "confidentiality" strand of privacy is found in footnote 25 of Whalen. Cited therein is Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478, 72 L.Ed. 944, 48 S.Ct. 564 (1928); Griswold v. Connecticut, 381

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[20]The peculiar facts of the Nixon case, and in particular the bill of attainder aspects(433 U.S. at 468, 53 L.Ed.2d at 907) make the case applicable to a class of one. Moreover, public access was ". . . not now the issue." Mr. Chief Justice Burger, dissenting. 433 U.S. at 524, 53 L.Ed.2d at 941.

U.S. 479, 483, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965); Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969); and the separate dissent and concurrence of Mr. Justice Douglas and Mr. Justice Stewart, respectively, in California Bankers Ass'n. v. Shultz, supra. Yet none of these cases directly ruled upon publication of governmentally collected data. Olmstead, Stanley, and California Bankers Assn. focused primarily upon governmental intrusion and collection of data, and the quote from Griswold (an autonomy case) also related to intrusion and collection of data. Thus, the authority cited for a "confidentiality" strand of privacy is rather slim.

But more important, the issue posed in Whalen (but avoided on Whalen's facts) was the Plaintiff's claim that

> The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. (e.s.)

429 U.S. at 600, 51 L.Ed.2d at 74. This was precisely the same issue addressed and laid to rest in Paul v. Davis, supra. Governmental publication of data which may adversely affect one's reputation,

without a direct connection to an explicit constitutional guarantee, does not implicate fundamental constitutional rights.[21]

In sum, there is no constitutional right of privacy against public disclosure of the financial and commercial information herein with respect to these elected state officers.

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[21] Whalen might have discovered a right of privacy tied to the "autonomy" line of cases since decisions concerning the care of one's body and interest in personal physical health are far closer to procreative intimacies than the financial and commercial matters involved herein. Cf. Estelle v. Gamble, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976). But see Whalen v. Roe, 429 U.S. at 602 n. 29, 51 L.Ed.2d at 75 n. 29, and accompanying text;

> . . . disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.

B. Even if a right of confidentiality exists herein with respect to financial information, the proper test for determining the validity of disclosure is a balancing test, not a "least restrictive means" test.

The Petitioners rely again upon Buckley, Nixon, and Whalen, supra, for their assertion that public disclosure must be measured by a "least restrictive means" test, and again their reliance is misplaced.

As discussed above, Buckley applied the strict test because First Amendment freedom of speech, expression, association, and belief were at stake. Acquisition and expenditure of money for political expression was the issue in Buckley. Disclosure of such financial matters, anchored firmly in the First Amendment, is wholly different from disclosure of general commercial and financial information. Buckley thus does not support a "least restrictive means" test here.

Petitioners' discovery of a "least restrictive means" test in Nixon is also in error. On page 48 of their Brief, Petitioners identify and quote a passage from Nixon as a basis for application of a "least restrictive means" test to a general claim of confidentiality. That passage, however, occurs only in the section in the Nixon decision which discusses recorded communications with respect to the former President's political activities as head of the Republican Party. 433 U.S. at 465-66, 53 L.Ed.2d at 905. Obviously these communications were, in and of themselves, the exercise of speech, belief, and association. Thus, when the Court later

relied upon a "least restrictive means," test, 433 U.S. at 467, 53 L.Ed.2d at 906, it did so not in analysis of a general privacy claim, but in weighing a First Amendment right. This becomes especially apparent by the Court's citation and quote from Buckley.[22]

The Nixon decision seems to apply more of a "balancing" test than a "least restrictive means" test in its analysis of the privacy claim which focused upon Mr. Nixon's intimate communications with his family and his voice-recorded diary. 433 U.S. at 455-65, 53 L.Ed.2d at 899-905. Given Mr. Nixon's status as a public figure and the commingling of intimate familial speech with a mass of clearly public material, the Court concluded that on balance the review of such communications by government archivists was a reasonable means selected by Congress to effect return of those recorded communications which Congress by statute had determined would be returned to Mr. Nixon. 433 U.S. at 465, 53 L.Ed.2d at 905. Thus, upon the particular facts presented, the Court had no occasion to determine whether a "least restrictive means" test was required.

Petitioners' analysis of Whalen is similarly in error. Petitioners say on page 49 of their Brief that Whalen found a "compelling state interest in requiring the recording of the medical data in a

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[22]See also Mr. Chief Justice Burger's dissent, relying upon Buckley. 433 U.S. at 527, 53 L.Ed.2d at 943.

centralized computer bank." On the contrary, Whalen did not use a "compelling state interest" test to determine the constitutionality of data collection. Whalen instead applied the much less exacting rational basis test, and indeed noted that such test today is applied far more cautiously than when Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905) was decided. Whalen's discussion and rejection of the approach in Lochner v. New York makes this very clear. The Court in Whalen wrote:

> State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.

(Footnotes omitted.) 429 U.S. 589, 597, 51 L.Ed.2d 64, 72, 97 S.Ct. 869 (1977). The discussion at footnote 20 is especially pertinent. The Court then concluded that even if the state's experiment in data collection resulted in a "mountain of useless information" (e.s.), the state was to be allowed such experimentation in its efforts to deter and detect drug misuse:

> It follows that the legislature's enactment of the patient identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional. (e.s.)

429 U.S. at 598, 51 L.Ed.2d at 73.

Petitioners then attempt to build upon their error, asserting that Whalen not only applied a "compelling state interest" test to data collection, but also to data publication. At page 51 of their Brief, Petitioners conclude Section II of their argument with the assertion that the Court in Whalen

> . . . has clearly stated that public disclosure as well as recording must meet the test of overwhelming need and the absence of other reasonable alternatives. (e.s.)

If Whalen expressly rejected any need to find a "necessity" for data collection, it would be even more apparent that Whalen does not provide the logic for Petitioners' attempts to have a "least restrictive means" test applied to data publication. In any event, like Nixon, Whalen is limited to its facts and was not an occasion for the Court to have determined whether a "least restrictive means" test must be applied.

Thus, even if some general right of privacy exists in commercial data, it would

be correct for the courts below to have applied a balancing test to the disclosure of such information.[23]

C. The decisions of the Courts below are correct even if a "least restrictive means" test is applied.

It is important to reiterate that the public disclosures required in this case apply to "elected constitutional officers" in Florida, and these Petitioners are elected State Senators. Petitioners are responsible not to the "State" in the abstract, or to any Commission or agency thereof, but to the people. The Sunshine Amendment was proposed by and enacted by the people of Florida, not by their representatives.

Petitioners suggest that secret

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[23]The Fifth Circuit noted that application of a strict scrutiny test to laws requiring disclosure of financial information would have far-reaching effects:

> Subjecting financial disclosure laws to the same scrutiny accorded laws impinging on autonomy rights, such as marriage, contraception, and abortion, would draw into question many common forms of regulation, involving disclosure to the public and disclosure to government bodies.

(Footnote omitted.) Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

disclosure to the Commission on Ethics is the "least restrictive means" to achieve what they concede are compelling state interests in fostering accountable, trustworthy government. Perhaps Petitioners would also suggest that the people deliver their proxies to the Commission on Ethics as well so that there can be a logical marriage of relevant information and the privilege of voting. While that would greatly simplify administration of Florida's next general election of "elected constitutional officers," it is not without its effects upon a popular democracy.

Public disclosure, in short, is the least restrictive means. The compelling issue here is accountability to the people, not to another level of bureaucracy. Public disclosure is the only method[24]

(1) To inform the voters so that they may place a candidate more precisely in the political spectrum and alert the voters to those interests to which a candidate or incumbent will most likely respond; and

(2) To deter corruption by exposing an incumbent officer's financial interests and activities to a broader range of alert and informed citizens, thus making it more difficult for an

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[24]Cf. Buckley v. Valeo, supra, 424 U. S. at 66-68, 46 L.Ed.2d at 715.

official to vote his or her self-interest.

These interests cannot be achieved by any other means "less restrictive."

Disclosure also fosters a third significant state concern, that of detecting and facilitating prosecution of violations. Petitioners say this could be achieved by confidential disclosure to the Commission on Ethics.[25] This overlooks the fact, however, that in a state as politically and geographically diverse as Florida, a state agency cannot police a record-keeping operation nearly as well as can the citizens and local media in the residence of the public official.

Finally, public disclosure is essential to re-establish a measure of trust between the people and their public trustees. Disclosure to a secret Commission would only create yet another specially privileged class, yet another network of secret relationships, and therefore further under-

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[25] In their state litigation, Petitioners so far have successfully convinced Florida courts that the Commission on Ethics has no enforcement authority under the Florida Constitution against a state legislator. See Plante v. Gonzalez, 356 So.2d 1353 (Fla. 1st DCA 1978). Thus their suggestion herein that confidential disclosure to the Commission will facilitate prosecution of violations by state legislators is indeed inconsistent.

mine the confidence of the people of Florida in their government.

Regardless of the name to be applied to the test used, the Fifth Circuit recognized that the substantial interest in informing the electorate could be met in no way other than public disclosure:

> This educational feature of the Amendment [public disclosure] serves one of the most legitimate of state interests: it improves the electoral process. That goal, recognized as important by the Supreme Court in Buckley, can be met in no other way. That goal justifies public publication of the senators' financial statements.

Plante v. Gonzalez, 575 F.2d at 1137.

Thus, for this final reason, the decision of the Fifth Circuit herein is correct and does not involve a question of federal law of great significance.

III.

PETITIONERS' ATTEMPT TO ASSERT THE ALLEGED PRIVACY RIGHTS OF THIRD PARTIES IS PREMATURE.

Petitioners' complaint does not allege that the privacy interests of "clients, customers and business associates" are at stake. The only reference in Petitioners' complaint to third persons is

to family members: ". . . his parents, his brothers, and his family . . . ." (Petitioners' Brief, p. 52-53) Thus, it is inappropriate for Petitioner herein to assert the alleged privacy interests of "clients of attorneys, the patients of physicians and psychiatrists and the prescription drug users of pharmacists." (Petitioners' Brief, page 12.)

But there is an even more fundamental reason why this parade of horribles is not before the Court: disclosure of the identity of such third persons is highly speculative in view of the rules of the Commission on Ethics governing secondary source of income disclosure.[26] The identity of clients or customers of a "business entity" which provides income to the public officer need be disclosed only if the following tests are met:

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[26]Rule 34-8.05(2), Fla. Admin. C., adopted April 4, 1977, provides:

> (2) A "secondary source of income" shall mean any one customer, client or other source of income which provides in excess of 10% of the total income of a business entity, as shown on that business entity's most recently filed income tax return, during the previous tax year in which a person subject to full and public disclosure of financial interests own in excess of five percent (5%) of the business entity's total assets or capital stock and from which such person derived in excess of $1,000 income during the previous tax year.

> 1. The customer or client is a major source of income to the "business entity," providing in excess of 10% of the business entity's annual income; and
>
> 2. The public officer owns in excess of 5% of the business entity's total assets or capital stock; and
>
> 3. The public officer receives in excess of $1,000 income annually from the business entity.

"Business entity" is defined by §112.312(3), Fla. Stat. to include sole proprietorships, self-employed individuals, as well as corporations or partnerships.

Most attorneys or physicians derive income from "business entities" in the form of partnerships or professional services corporations, but even the self-employed practioner's "business entity" is covered by the above definition. Physicians typically have far more than 10 patients per year, so it is highly unlikely that any one patient will provide in excess of 10% of the income to the physician's "business entity." Lawyers may have one or two such major clients, but often these are quite well-known through representation before public tribunals. Indeed, some of the major clients who have (in Petitioners' words, page 55, Petitioners' Brief) chosen to utilize the "lawyering talents of Senator Barron" are listed as clients of Petitioner's law firm in Martindale-Hubbell, pages 1431B - 1432B.

Disclosure of "prescription drug users of pharmacists" (there are no such Plaintiffs herein) could never occur since pharmacists typically do not own 5% of the business entity. Of those which do, it is highly unlikely that any one drug purchaser would provide over 10% of the annual income to the drug store or pharmacy.

Thus, even if Petitioners' complaint had attempted to assert privacy claims of clients, patients, and drug purchasers, such claims would be extremely hypothetical and premature. Relevant here is California Bankers Ass'n., supra, where the Court ruled it unnecessary to determine whether bank plaintiffs had standing to assert privacy of third-party bank depositors because

> . . . in any event, the claim is premature.

416 U.S. at 51, 39 L.Ed.2d at 835. See also Ass'n of American Physicians and Surgeons v. Weinberger, 395 F.Supp. 125, 137 (N.D. Ill., E.D. 1975), aff'd per curiam, 423 U.S. 975, 46 L.Ed.2d 299, 96 S.Ct. 388 (1975), which ruled that physicians could not assert the premature privacy claims of patients.

Petitioners' reliance upon Bates v. City of Little Rock, 361 U.S. 516, 4 L.Ed. 2d 480, 80 S.Ct. 412 (1960), and N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958) for their own standing to assert privacy claims of third-parties is inappropriate. It is one thing to allow a political association

itself (the N.A.A.C.P. or Bates, its agent) to assert the First Amendment claims of its members, and wholly another to allow these individual Petitioners to speculate concerning the diverse expectations and claims of third-parties herein.

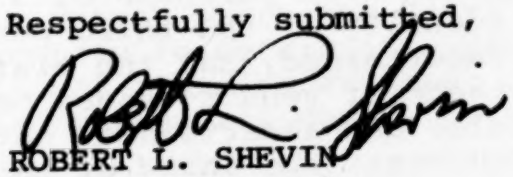
Craig v. Boren, 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451 (1976) is similarly not a relevant basis for Petitioners' standing. The claim in Craig v. Boren was denial of equal protection to a class of males ages 18-20 who were entirely precluded from purchase of 3.2% beer. Thus, the identity of the third party was fixed and ascertained, and the claim - the total severance of vendor-vendee nexus - was singular and ascertained, not hypothetical. In contrast, the shape of third-persons' claims to privacy and the identity of such persons in the case at bar remains theoretical rather than concrete. Petitioners ought not have standing to assert such premature claims.

The Fifth Circuit thus was correct that such particularized claims should not be resolved upon this facial challenge to the Sunshine Amendment, and should await another day.

CONCLUSION

The decisions below are in accord with the overwhelming majority of courts which have closely considered public financial disclosure laws against federal privacy claims. But more important, the decisions below have correctly understood and applied the decisions of this Court. The occasion, therefore, for review by certiorari is not presented herein, and the petition should be denied.

Respectfully submitted,



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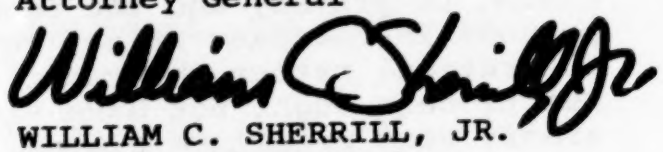

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was this 22nd day of December, 1978, served upon the following persons:

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